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No. 99-62

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In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI[1]

Amici are religious organizations serving persons of deep religious faith who believe in the significance and efficacy of prayer. Amici write chiefly to emphasize the damaging effect of government-endorsed religion on religious liberty and on religion itself. We leave the briefing of other legal arguments to the parties and other amici.

The Baptist Joint Committee on Public Affairs is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici, its members, and its counsel has made a monetary contribution toward the preparation and submission of this brief.

autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The J.M. Dawson Institute of Church-State Studies is a free-standing unit within Baylor University, the largest Baptist university in the world. The Institute offers M.A. and Ph.D. degrees in Church-State Studies, conducts research and publishes books on church-state relations and religious liberty in national and international contexts, publishes the internationally known *Journal of Church and State*, maintains the largest research library in the world pertaining to church-state relations and religious liberty, and sponsors conferences and lectureships on various church-state themes.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than ten million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,300 congregations in the United States with nearly 800,000 members. The church strongly supports the twin concepts of free exercise of religion and the separation of church and state and actively promotes those ideals through its bi-monthly *Liberty* magazine.

SUMMARY OF THE ARGUMENT

This case involves a school district's policy authorizing and encouraging school prayer. It is not fundamentally a case concerning free speech, as Petitioner

contends. Santa Fe ISD has a long history of allowing students to recite overtly Christian prayers during graduation ceremonies and before football games. It was only after litigation commenced in this case that the Santa Fe school board decided to pass a policy concerning football game prayers. As the litigation evolved, the Santa Fe ISD drafted a policy covering "brief invocations and/or messages" prior to football games. Much of Petitioner's brief is dedicated to its assertion that the language "or message" transformed this school policy from one authorizing prayer to one that is content neutral by encompassing both secular and religious speech. Petitioner essentially wants this Court to concentrate on form over substance – to ignore the factual truth that this case is all about a public school district trying to find a constitutional way to authorize prayers delivered by students prior to school football games. Here, as in *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 524 (1993), the policies "in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom." The Fifth Circuit recognized the true nature of the school district's policy, calling it a "policy to address football game invocations." *Doe v. Santa Fe ISD*, 168 F.3d 806, 812 (1999).

Because school prayer is at issue, this case should be analyzed under the Establishment Clause. Amici believe that the Santa Fe ISD prayer policy violates the Establishment Clause because it constitutes state endorsement of religion, coerces the citizens (especially the students) that

attend the football games to participate in religious activity, and violates the test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Amici fully concur with the holding in *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990), that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Private speech endorsing religion clearly would include prayers offered individually or by groups of fans and students (including football team members) before, during, and after the game, or prayers offered by those attending the game during a neutral moment of silence. But the Santa Fe prayer policy clearly encourages "government speech endorsing religion."

Additionally, Amici are deeply concerned about the mixed message Santa Fe ISD sends to its students about religion. On the one hand, its policy stands as an endorsement of prayer – a quintessential religious act. But on the other hand, the school district's policy denigrates and trivializes the act of prayer by portraying an act of religious devotion as a quasi-secular ceremonial practice. Even more dangerous, the policy invades the sacred realm of private religious expression by telling students that their prayers must be nonsectarian and nonproselytizing, which equates to state monitoring and censorship of religion. For all of these reasons, Amici believe that the judgment of the Fifth Circuit should be affirmed, and that the Santa Fe ISD policy should be held unconstitutional.

ARGUMENT

I. SANTA FE ISD'S POLICY OF ALLOWING STUDENT-LED PRAYER AS PART OF THE PRE-GAME FESTIVITIES VIOLATES THE ESTABLISHMENT CLAUSE

Santa Fe Independent School District ("Santa Fe ISD") is a political subdivision of the State of Texas. Its governing body is an elected, seven member Board of Trustees. The trustees are responsible for overseeing the public education of some 4000 students that live in a small South Texas community. During the 1992-93 and 1993-94 school years, the Santa Fe ISD permitted students to read overtly Christian prayers over the public address system prior to all home football games. *Doe*, 168 F.3d at 810 & n.3. No written policy regarding these prayers existed prior to the underlying litigation in this case.

During the course of this lawsuit, the Santa Fe ISD passed a policy regarding invocations during the pre-game festivities ("prayer policy") which provides the following:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation

> will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

The board also issued a contingent policy concerning the content of invocations or messages that students should give. The contingency provided that should the Santa Fe ISD be enjoined by a court order (as subsequently happened at the federal district court level), the policy then would include a requirement that students give a "nonsectarian, nonproselytizing" prayer or message.[2]

Thus, the Petitioner's current prayer policy, challenged herein, requires all student prayers to be nonsectarian and nonproselytizing.

Amici believe that Santa Fe's pregame prayer policy violates the endorsement, coercion, and *Lemon* standards developed by this Court for analyzing alleged violations of the Establishment Clause.

A. The Endorsement Standard

The Establishment Clause prohibits the state from taking action which endorses or disapproves of religion. The standard is whether a reasonable person would perceive from the government's activity that religion is being

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[2] This specific content limitation language was chosen to comport with *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

endorsed or disapproved by the state. *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring). Government actions endorsing religion are dangerous because they "send[ ] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Amici believe that the Santa Fe ISD unconstitutionally endorses religion by including prayer within its pregame football festivities.

Petitioner insists that there is no state endorsement of religion when it allows students to offer brief prayers before football games. But Petitioner is wrong. After sitting in the high school football stadium, hearing the announcer call the crowd to order and introduce the student offering the prayer, watching the crowd stand together in an attitude of reverence, and listening to the prayer over the school's loud speaker system, any reasonable observer would inescapably conclude that the Santa Fe ISD endorses the religious act of prayer.

Amici fully concur with the holding in *Board of Education v. Mergens*, 496 U.S. 226 (1990) at 250, that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Amici contend, however, that the prayers offered by students at Santa Fe football games go beyond protected private speech and free exercise of religion. A full evaluation of the context of the prayers and the school district's involvement in the prayers leads to the inescapable conclusion that the

prayers are the equivalent of "*government* speech endorsing religion." And Petitioner's policy of providing a program of pre-arranged, programmatic prayer at football games is categorically different from situations in high school settings where student religious speech is spontaneous or random, such as when a student chooses to make religious statements during her one-time valedictory address. The former is clearly state endorsement of religion; the latter is protected private speech.

Petitioner believes that it has so removed itself from pregame prayers that it cannot be said to be endorsing religion. But in fact, the school maintains complete control of the event. First of all, Santa Fe ISD created the prayer policy and the mechanisms by which the students decide whether the prayer will occur. The policy states that an election will occur "[u]pon advice and direction of the high school principal." The school system places its authority behind the selection procedure by ensuring that the voting results are carried out in accordance with school district policy. Furthermore, the school system owns, maintains, and controls the use of the physical facilities where the football game is played. Uniforms worn by student athletes and members of the cheerleading squad, band, drill team, etc., are paid for with school district monies. All revenues from the game, except those shared with the opposing school, benefit the Santa Fe ISD. The scheduling of the game, the game itself, and all activities associated with the game are a part of the Santa Fe public school machinery. The school system also owns, maintains, and regulates the use of the loud speaker system – including allowing only authorized persons to use the microphone during pregame festivities. The

degree of Santa Fe ISD's involvement in the pregame prayers – including its monitoring of the student offering the prayer and the content of the prayer itself – means that the prayers themselves bear the imprint of the school district, and therefore the state's endorsement.

B. The Coercion Standard

This Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1991), underscored the fact that government may not coerce directly or indirectly any citizen to support or participate in religious exercises. The specific question addressed in *Weisman* was whether the religion clauses of the First Amendment were violated by a public school system's practice of inviting local clergy to offer invocations and benedictions as part of middle and high school graduation ceremonies. Although the Court was reviewing a factually different scenario – school selection of clergy to lead prayer at graduation versus student-led prayers at pregame festivities – many of the Court's observations apply equally to this context.

This Court determined that the graduation prayer policies of the Providence, Rhode Island School District violated the First Amendment by creating significant and pervasive government involvement with religious activity. 505 U.S. at 587. Particularly significant was the potential for religious divisiveness between students and parents and the school because there was an "overt religious exercise in a secondary school environment where . . . subtle coercive pressures exist" and where objecting students have no real alternative to participation other than feigning participation or not attending at all. *Id.* at

588. The Santa Fe ISD seeks to differentiate its practices from those of the Rhode Island School District which this Court invalidated. First, Petitioner contends that no students are coerced to participate because the students vote first on whether to have the prayers and then on the student to lead the invocation. The student voting procedure in no way lessens, however, and in some ways increases, the coercive nature of the school district's policy. Using the voting process to advance the religious views of the majority of students against the conscience of the minority violates a primary purpose of the Establishment Clause – to protect the rights of members of minority religions. As this Court held in *West Virginia v. Barnette*, 319 U.S. 624, 638 (1943), "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Under Santa Fe's voting procedure, it is virtually assured that members of minority religions will never have the opportunity to offer a pregame prayer. The threat of government-sanctioned majoritarianism to human freedom was well-summarized by James Madison:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.[3]

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[3] James Madison to Thomas Jefferson, October 17, 1788, reprinted in *The Essential Bill of Rights*, Gordon Lloyd et al. eds. (University Press of America, reprint, 1998), 326.

Petitioner also argues that football games are voluntary, non-academic activities without coercive effect upon students and other persons attending football games. Petitioner focuses attention on the rights of the praying student – arguing that a student should be free to step up to the microphone and say, or pray, whatever the student desires. The problem with this analysis is that it completely ignores the rights and interests of all of the other students, teachers, and fans who come to the game, not to pray or engage in religious activity, but to enjoy a high school athletic event. As this Court recognized in *Weisman*, subtle coercive pressures exist in the context of school activities. Young people, particularly adolescents, are especially sensitive to peer pressure.[4] To emphasize the technical fact that attendance at a football game is voluntary is to ignore the realities of the situation. In the first place, attendance is not always voluntary in the strict sense. Football players must attend the game. Attendance is also mandatory for the student equipment managers, members of the band, the cheerleaders, the drill team, the pep squad, or teachers who must supervise the events. As for the rest of the students, while attending a football game may not be as momentous as attending one's high school graduation, going to high school sporting events

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[4] Justice Kennedy, in his concurring opinion in *Board of Education v. Mergens*, 496 U.S. 226 (1990) at 261-62, described the test for coercion in this way: "The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw."

(which include special annual events like homecoming), certainly provides those "intangible benefits which have motivated the student through youth and all her high school years." *Weisman*, 505 U.S. 595.

High school football games are athletic events sponsored by the school district for students. With the exception of the coaching staff, the participants are students. While not every student attends every game, the school nevertheless encourages students to attend such events as part of the overall educational experience. Going to the game can become essentially mandatory, especially in the social atmosphere existing in small Texas communities and elsewhere, where high school football frequently engenders fierce loyalty of the students, their families, and even the community at large. Public schools, through pep rallies, fundraisers, and other school-sponsored events, work to make sure that virtually all students attend football games, either as participants or as fans. But in the Santa Fe School District, if students wish to attend a game – as a player, a band member, a cheerleader, or as an admission-paying fan – they must also participate in the religious exercise of the pregame prayer, if the majority of students voted to have one. In sum, the Santa Fe policy coerces non-consenting students to participate in religious exercises.

Imagine the predicament of a high school student desiring to attend the Friday night game, but not wanting to hear a prayer over the loud speaker. She desires to support her team and show her "school spirit" – as urged that afternoon by the principal, coaches, team, and cheerleaders during the school pep rally. Furthermore, her boyfriend is on the football team, her best friend is on the

pep squad, and her little brother is in the marching band. In other words, the student has compelling reasons to attend the game, some personal and some urged directly by the school itself. The student takes her place in the stands among family and friends that are present for similar reasons. All watch and participate in the pregame festivities. The marching band's pregame program includes the school's fight song and alma mater. Then the announcer asks the crowd to stand, if they are not already, and to quiet down. The band and ROTC color guard leads the crowd in the national anthem. The crowd then is asked to remain standing, and a schoolmate is introduced as the student chosen to offer the pregame invocation. The non-consenting student, surrounded by her friends, schoolmates, family, family of her friends, teachers, and administration, is now caught: she is caught between the Scylla of standing while feigning participation in the religious exercise (thereby violating her own religious conscience) and the Charybdis of obvious non-participation – by refusing to bow her head, sitting down in front of everyone or by physically leaving the stands.[5]

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[5] Asking a teenager to assert her dissent to a public exercise of religion in front of her classmates is difficult enough, but asking her to assert her dissent in front of adults, including those in direct authority over her, is simply beyond the bounds of reasonableness. The difference in the age of the persons involved differentiate this case from *Marsh v. Chambers*, 463 U.S. 783 (1983). Opening a state legislative session with prayer differs vastly from beginning a high school football game with prayer. The influence of the legislative prayer upon the consciences of the adults present must be differentiated from the influence of prayer on the teenagers and children present who naturally perceive their school officials as having

The state should not force these options on a socially anxious, peer-pressure sensitive, lacking-in-self-confidence adolescent – surely an apt description of many teenagers.

To ask our young dissenter to act according to her conscience in front of peers and adults is to ask her to fight against the strongest social forces in her young life. We have not progressed so far in our collective religious tolerance that we can ensure the student who publically dissents from the majority's religious views that she will not meet with ridicule, if not cruelty. If nothing else, this is what the First Amendment protections mean – that the state should not and cannot place a person of tender age in the untenable position of having to choose between violating her conscience by feigning participation in a state-endorsed, public religious exercise, or making a maverick public assertion of dissent by refusing to participate. The mere fact that students were forced to bring

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sanctioned the prayer, even though a student is at the microphone. Justice Souter in *Weisman* also differentiated *Marsh*, since in the prayers used to open legislative sessions, government officials are invoking spiritual blessings for their own benefit, without directing any kind of religious message at the constituents they represent. 505 U.S. 630, n. 8. Similarly, in *Allegheny*, Justice Blackmun noted: "Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." 492 U.S. at 603, n. 52. And certainly no one can claim that the practice of offering pregame prayers is an accepted tradition dating back to the founding era, as was legislative prayer. *Marsh*, 463 U.S. at 786.

this suit anonymously suggests that they feared the ridicule and ostracism that would attend the revealing of their identity.

Finally, Petitioner ignores the fact that there are two other groups of young people present at the Santa Fe football games who have no opportunity to vote or to have any say in the matter of pregame prayers. First, there are the students of Santa Fe ISD's primary, intermediate, and junior high schools. These students in this small community are no doubt urged to attend varsity football games; many may have older brothers or sisters involved. Not only are they excluded from the high school's voting procedure, they are unlikely to understand the distinctions of the school board's policy. They hear only the prayer. But the second, and perhaps more important, non-voting group consists of the players, band members, cheerleaders, and fans from the opposing school. They not only have not participated in the vote, they probably know nothing about the school board's policy. All of the young people in these two groups form a captive audience. By their attendance at high school football games, they are coerced to participate in the prayers offered at the Santa Fe games.

C. The *Lemon* Standard

For over twenty-five years this Court has frequently followed the test set out in *Lemon v. Kurtzman* as a tool of Establishment Clause analysis. *Lemon*, 403 U.S. 602 (1971). For a government policy or activity to withstand a constitutional challenge, it must have a secular purpose, its primary effect must neither advance nor inhibit religion,

and the policy or practice must not foster excessive entanglement between government and religion. 403 U.S. at 612-13.

Petitioner claims that its prayer policy has as its primary secular purpose the encouragement and accommodation of student speech (Petitioner's Brief at 23). Petitioner misplaces its reliance upon language in *Widmar v. Vincent*, 454 U.S. 263 (1981). *Widmar* involved an open forum created by a public university when it permitted student groups to use its facilities.[6] This Court suggested that creation of such a forum, in conjunction with a policy of nondiscrimination against religious speech, could be a secular purpose. 454 U.S. at 271. However, Santa Fe ISD's factual situation is not even remotely similar. The holding in *Widmar* in no way justifies Santa Fe's prayer policy. Time reserved during pregame festivities for student-led prayer does not equate to the type of open forum created by the university when it opened its buildings so that groups of students could come together to exchange ideas. *Id.*, n.10. The Santa Fe ISD allows only one student at a time to use its public address system at the school's football stadium in order to lead a crowd of people, many of whom had no vote in the matter, in religious activity. Petitioner cannot take refuge in the secular purpose found to exist in *Widmar*.

As an additional secular purpose for its policy, Santa Fe ISD points to the four-fold purpose of solemnizing the

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[6] At issue in *Widmar* was whether a university which made its facilities generally available to student groups for their activities could exclude religious groups from likewise using campus buildings.

occasion, expressing confidence in the future, encouraging the recognition of what is worthy of appreciation in society, and fostering an atmosphere of sportsmanship at football games. The school district does not indicate how the pregame prayer accomplishes these four purposes, and it is unclear how the student invocation may do so. While a pregame prayer may be used to call to order and silence the boisterous crowd of students, family, and fans, and while the prayer indeed may be used to invoke a blessing and request safety for the young players engaged in a relatively physical and sometimes dangerous sport, these ends are insufficient to establish a secular purpose for prayer. A crowd may be silenced by the singing of the national anthem or the school's alma mater. Vocal prayer is not necessary to call the crowd to order.

Undoubtedly safety of the players and good sportsmanship are chief concerns for all present at a high school football game. Yet the fact that Santa Fe ISD deems it important to use a prayer to reach these ends underscores the truly religious intent of this activity. Those believing in prayer's power to invoke God's protection and blessing clearly ascribe to prayer a divine purpose, not a secular one.

In violation of the second prong of the *Lemon* test, Santa Fe ISD's prayer policy also has the primary effect of advancing religion. The history of this school district's policies regarding prayer at both graduation and football games clearly indicates that the goal always has been, and still is, to permit religious prayers at these school functions. Prior to the underlying litigation, the prayers given at Santa Fe's graduations and football games were

not only significantly religious, but overtly Christian. *Doe*, 168 F.3d at 810 & n.3. Prayers were delivered by a student chaplain. *Id.* at 810 n.4. Why would prayers be delivered by a "chaplain" if not to advance religion? The first drafts of the school board policies regarding football games referred only to invocations and benedictions. *Id.* at 811. While the current policy regarding football games refers to a "brief invocation and/or message," it is clear from the historical context that the school district contemplated that religious prayers would be offered.

Petitioner likens the opportunity it gives students to pray prior to football games to the forum reviewed in *Mergens*, in which a secondary school officially recognized student groups and clubs and permitted them to meet after hours on school premises. The opportunities for student speech are significantly different in the two situations. In *Mergens*, the high school encouraged student speech by allowing the various voluntary student groups and clubs which students joined to meet on the school campus. The present case involves prayer given by students to a captive audience (players, cheerleaders, band members, pep squad members, drill team members, and ticket-purchasing fans) who have come to particpate in an athletic event. In *Mergens*, the students attended a planned *religious* event in which all consented to the planned religious activites, but here the students attend a planned *athletic* event and are coerced to participate in religious activity to which not everyone has given their consent.

Santas Fe's prayer policy also causes an excessive entanglement between religion and government.[7] Seeking to "hedge" its bets as to the constitutionality of its prayer policies, Santa Fe issued an alternate policy requiring that prayers offered by students in the pregame festivities must be "nonsectarian and nonproselytizing." Any monitoring of the content of the students' pregame prayers constitutes significant involvement of the school district in the pregame invocations. Under this policy, school officials are responsible not only to ensure that the results of the student vote are carried out, but also that the selected student prays a "nonsectarian and nonproselytizing" blessing. In all likelihood, in addition to this monitoring, the school, via the administration or teachers, will have to actually instruct the students as to what constitutes a nonsectarian, nonproselytizing prayer – presumably in keeping with the schoolboard's own determination. Invariably, the courts will end up reviewing piecemeal the prayers recited by the students at the games.

In his concurrence in *Weisman*, Justice Souter noted that the nonpreferentiality of each individual prayer must be judged by its text. The prospect of the courts reviewing every prayer, some dozen or so a season, is certainly a daunting one and serves to illustrate the inevitable entanglement resulting from the school district's policy. 505 U.S. 617.

As Justice Kennedy noted in *Weisman*, the school system's efforts to direct the content of prayers may be a

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[7] *Agostini v. Felton*, 117 S. Ct. 1997 (1997).

good-faith attempt to ensure that sectarianism is absent from the event, but it does not resolve the dilemma caused by such invasive participation by the school. 505 U.S. 588-89. The spectre of the school's invasion into matters that are purely religious underscores why Santa Fe ISD's policy runs afoul of the Establishment Clause.

II. THE POLICY OF CIVIC PRAYER CHAMPIONED BY SANTA FE DENIGRATES GENUINE RELIGIOUS FAITH AND ITS PRACTICES

A. State Involvement in Prayer Denigrates Religion

Seeking to make its policy of pregame prayer constitutional, the Santa Fe ISD essentially tries to "secularize" the sacred act of prayer – to make it socially acceptable within the public context of high school football games. But prayer cannot be secularized. Any attempt to do so denigrates religion. Prayer is, by its very nature, a religious act. Unlike the Christmas holiday, there are not both secular and sacred elements in the act of prayer. This Court has recognized this fact many times, but no more succinctly than in the words of Justice Hugo Black: "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). Justice Black's conclusions are true because prayer cannot be sufficiently secularized or neutralized to change it into anything other than what it is – an act of religious devotion and supplication seeking divine intervention in human affairs.

The sanctity of prayer is preserved best by keeping the state – including school districts – out of the business of endorsing and supervising the public prayers of its students. Rejecting Santa Fe ISD's policy of having pregame prayers does not mean that students may not pray during school hours and at school-related events, including athletic events. If the school district policy is rejected as unconstitutional, students and fans of Santa Fe will not be deprived of entering into meaningful prayer that sportsmanship will be exhibited, or that those on the football field will remain free from injury, or that fans' return trip home will be uneventful. These prayers can be offered individually or by groups of fans and students (including football team members) before, during, or after the game, as protected private speech. If the loud speaker is to be used, an announcement before the game calling for a moment of silence, which could be used for prayer by those who wish to pray, would be altogether appropriate. *Wallace v. Jaffree*, 472 U.S. 38 (1995), protects a policy of silent meditation if not implemented strictly for religious reasons. Such a practice at high school football games would be far more consistent with the *Lemon*, non-endorsement, and non-coercive requirements that Petitioner unconvincingly argues are met by the Santa Fe prayer policy. Many school districts in Texas, in light of the Fifth Circuit's ruling in the present case, have already ended their Santa Fe-like practice, adopting in its place the "moment of silence" practice, believing that it is sanctioned by this Court.

Much of what fuels the debate over religious activity in the public schools is the belief that America is in significant moral decline. Whether or not this is true, to

the extent that moral training requires religious foundations, the best solution is to look to religious communities and other nongovernmental sectors of our society for assistance, not to the public schools and other governmental institutions. This suggestion in no way means, of course, that public schools should not have a role in promoting morality, only that they not use religion as the basis for teaching moral behavior to students. Religion in America remains robust precisely because it remains independent of government support and regulation. In regions of the world where government is a religious advocate, where church and state are readily mixed, the people have lost to a considerable degree their desire to support their own religious institutions – because government does it for them. The result too often is the death of the voluntary spirit that sustains the dynamism and vibrancy of true religion, leading eventually to the demise of religion altogether. This process surely accounts for the decline of religion across much of Europe. Moral training must be a shared responsibility among all sectors of American society. The religious component of this moral training, including prayer exercises, must not be co-opted by governmental institutions under constitutional sanction. The result would be a confusion of roles, and further erosion of the founders' noble experiment in the separation of church and state.

B. Santa Fe's Prayer Practice as Civil Religion

In an attempt to salvage the practice of public prayer at events associated with the state – including public school activities – some argue that public prayer should

be permitted, and even encouraged, as a vestige of a civic or civil religion that undergirds the nation. The classic definition of civil religion in America is Robert Bellah's. Bellah contends that "certain common elements of religious orientation," shared by the great majority of Americans, "have played a crucial role in the development of American life, including the political sphere."[8] For Bellah, following Emile Durkheim,[9] the absence of a civil religion within any given society would lead to moral and spiritual decay among its people and, eventually, the decline or disappearance of the society altogether.

Bellah's account of civil religion presents the positive side of civil religion. But it has a negative, even ominous, side, too. The powerful symbols of civil religion are a constant temptation to political opportunists to exploit their emotional appeal for support of their favorite causes. Moreover, civil religion can become a form of idolatry, for it can become the object of ultimate loyalty in place of the God who is the true object of worship for most religious adherents.

Santa Fe ISD's policy on prayer at football games should not be upheld simply to perpetuate civil religion. Such a holding suffers the prospect of endorsing a policy whose political outcome becomes an idolatrous substitute for the worship of God. Moreover, such a holding would eviscerate much of the meaning of the First Amendment.

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[8] Robert Bellah, "Civil Religion in America," in *American Civil Religion*, eds. Russell E. Richey and Donald G. Jones (New York: Harper & Row, 1974), 24.

[9] Emile Durkheim, *The Elementary Forms of the Religious Life*, rev. ed. (New York: Free Press, 1965).

In *Weisman*, Justice Kennedy addressed the argument that commencement prayer should be countenanced as an expression of civil religion. He noted:

> There may be some support, as an empirical observation, to the statement . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.[10]

Kennedy's point here is that "civic religion," whatever its merits and however it might represent consensus, is religion just the same, and if promulgated by government, violates the Establishment Clause.

The sacred practice of religious expression through prayer must not be co-opted by the government as a means of preserving the secular purposes of civil religion. We already retain many prominent vestiges of civil religion: the motto, "In God We Trust," imprinted on our currency; the language "One Nation Under God,"

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[10] *Weisman*, 505 U.S. at 589. For an extensive treatment of the jurisprudential role of civil religion, see Derek H. Davis, "Civil Religion as a Judicial Doctrine," *Journal of Church and State* 40 (Winter 1998): 7-23.

included within our Pledge of Allegiance; the proclamation used to open judicial sessions – "God save the United States and this Honorable Court"; the annual declaration by our president of a National Day of Prayer. All of these symbols and activities, and more, are alive and well in American society. As Justice Brennan noted in his dissent in *Lynch*, these practices evidencing "ceremonial deism" are protected from Establishment Clause scrutiny "because they have lost through rote repetition any significant religious content. . . . The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essential secular meaning." 465 U.S. at 716-17 (1984) (Brennan, J., dissenting). Public prayers offered at football games by high school students do not fall within this category – they cannot and should not be considered secular activity.

Those symbols and practices of civil religion which are embedded in our national life and which serve to affirm the religious dimension of our common existence take on a threatening, altogether dangerous, quality if used to mold, shape, or influence the religious sentiments of impressionable young people. It is one thing for this Court's crier to proclaim before an audience of mature adults, "God save the United States and this Honorable Court," but quite another for high school students, acting under state endorsement, to be given captive audiences of peers to "lead" in prayer. This Court should take extreme care in naming those fora where civil religion is formally to be embraced.

We need not and should not promote public prayer, particularly nonsectarian and nonproseltyzing orations, as a way to perpetuate civil religion. The activity of prayer, unique to a wide range of religious belief and practice, should remain an area which is free from state intrusion, and consequently, outside the sphere of state activity – whether that be the courtroom, the classroom, or the football field. And make no mistake – the Santa Fe ISD prayer policy constitutes state activity – "*government* speech," in Justice O'Connor's terminology. *Mergens* at 250. The act of permitting students to do by proxy what the school district itself cannot do hardly removes the school district's prayer practice from the ambit of state activity. As Justice Kennedy has concluded: "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference." *Weisman*, 505 U.S. 589.

C. The "Nonsectarian, Nonproselytizing" Requirement

If the school is permitted to direct adolescents in *how* to pray by insisting that the content of their public prayer be nonsectarian and nonproselytyzing, the state has invaded private conscience and religious belief at its very

core. School officials' involvement in monitoring the content of the pregame prayers will and must be viewed by the students not only as the school's participation in the process, but as direction and instruction in how to compose an "appropriate" prayer. We may assume that the students volunteering for or campaigning for the opportunity of offering the pregame prayer are persons for whom prayer is a meaningful and essential expression of religious beliefs. Surely one must concede that the Establishment Clause, if it protects anything, protects young persons from state instruction in how to compose the prayers they pray.

Any attempt by government to determine the content of prayer – even if done in a misguided attempt to ensure that students' public prayers are sufficiently innocuous as to be "non-offensive" to the audience – results in injury to believers as well as non-believers, religion as well as irreligion. Any prayer which the state deems secular enough to merely "solemnize" an event inevitably is a prayer which many devout religious believers will find so devoid of religious significance as to border on the sacreligious. For some Christians, prayer offered in anything other than Jesus' name is theologically wrong; for Jews, prayer in Christ's name is idolatrous. For Unitarians, prayer suggesting a trinitarian God is unacceptable. For most Buddhists, prayer presupposing a personal god is foreign. Any guidelines on how to craft a prayer which is religiously tolerant and broadly appealing to all citizens places the weight of government approval behind a form of prayer that is theologically neutered and without any true sacramental significance. By trying to

include everyone and offend no one, such prayers essentially exclude all meaningful religious expression. They are mere ritual, void of the sanctity that should characterize them.

Attempts to find a "happy medium" among the various claims of faith and non-faith, made necessary when prayer is deposited in the politically charged arena of the public school setting, not only are futile, but misguided as well. Only one conclusion is possible. Whatever form of prayer a government sanctions, even if only by establishing guidelines that prayer be nonsectarian or non-proselytizing, is government endorsement of a specific kind of prayer.[11] Such a government policy is neither neutral as between religion or irreligion, nor good for religion in America.

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[11] See generally Justice Brennan's dissent in *Marsh*, 463 U.S. at 819-21.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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